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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 84

JESSE TURNER,

Appellant,

v.

CITY OF MEMPHIS, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT, TENNESSEE, WESTERN DIVISION

BRIEF OF APPELLEE, CITY OF MEMPHIS

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Opinions' Below

The per curiam opinion below is unreported but appears at pages A1-A3 of the Jurisdictional Statement.

Jurisdiction

Appellee submits to the jurisdiction of this Court.

Constitutional Provisions, Statutes, Ordinances and Regulations Involved

This case involves the following provisions of the Tennessee Code relating to the Division of Hotel and Restaurant Inspection, Department of Conservation of the State of Tennessee:

Sec. 53-2121—Rules and regulations authorized—Arbitration of inconsistencies.—The division is hereby authorized to make such rules and regulations, including a code of sanitation, as may be necessary to carry out the purpose of Sections 53-2101—53-2121 and to protect the public health and safety. In any instances where there is an inconsistency as between the requirements of the division and those of a local county, or city, health officer, such inconsistency is to be arbitrated by a three (3) man board consisting of the director, the local health officer concerned, and a third member to be chosen by these two. (Tenn. Code Ann. Vol. 9.)

Sec. 53-2120—Violation of regulations or provisions penalized.—Every owner, manager, proprietor, agent, lessee, or other person in charge of conducting any hotel or restaurant, who shall fail or refuse to comply with any of the provisions of Sections 53-2101—53-2121 or with the rules and regulations promulgated by the division, shall be deemed guilty of a misdemeanor, and shall be fined not less than ten dollars ($10.00) nor more than one hundred dollars ($100) for each offense, and each day after sufficient notice has been given shall constitute a separate offense. (Tenn. Code Ann. Vol. 9.)

Involved also is Regulation No. R-18 (L), promulgated by the Division, which provides:

Restaurants catering to both white and negro patrons *should* be arranged so that each race is properly segregated.

> Segregation will be considered proper where each race *shall* have separate entrances and separate facilities of every kind necessary to prevent patrons of the difference races coming in contact with the other in entering, being served, or at any other time until they leave the premises. (Tennessee Laws, Rules and Regulations for Restaurants, Department of Conservation, Division of Hotel and Restaurant Inspection. Approved June 18, 1952, filed in Office of Secretary of State) (Emphasis added)

This case also involves the following provision of the Tennessee Code:

> Sec. 62-710 Right of owners to exclude persons from places of public accommodiation.—The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is abrogated; and no keeper of any hotel, or public house, or carrier of passengers for hire (except railways, street, interurban, and commercial) or conductors, drivers, or employees of such carrier or keeper, shall be bound, or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry, or admit to his house, hotel, vehicle, or means of transportation, or place of amusement; nor shall any right exist in favor of any such person so refused admission; the right of such keepers of hotels and public houses, carriers of passengers, and

Regulation R-1 provides as follows:
"Definition of Terms
* * * * *
(d) The term 'shall' as used in these regulations is mandatory.
(e) The term 'should' as used in these regulations indicates desirability.
* * * * *

> keep ... of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, to be as complete as that of any private person over his private house, vehicle, or private theater, or places of amusement for his family. (Tenn. Code Ann. Vol. 11.)

There was no proof offered of the ordinances of the City of Memphis relating to segregation in rest room facilities at the Memphis Municipal Airport.

Question Presented

Whether the action of the District Court was proper in refusing to issue a permanent injunction and in applying the doctrine of abstention requiring Appellant to file suit for a declaratory judgment in the Courts of the State of Tennessee in order to obtain an authoritative interpretation of Tennessee statutes.

Statement of the Case

Appellee, City of Memphis, admits the facts as stated by the Appellant, beginning at page 5 of its brief.

Summary of Argument

The distinguished three judge court below properly required Appellant to repair to the Tennessee Courts for an interpretation of Tennessee law. In applying the abstention principle to the facts of this case, it is evident that the Court below felt that the posture of Appellant's case would be considerably changed by a state court interpretation of the statutes involved. Although Appellant submitted only

two possible interpretations for each set of statutes involved, it is manifest that there are many others which would moot the consitutional issue. Appellant's position is not substantially altered by the application of abstention and, in addition, there is no possibility of friction or conflict between national and state laws.

ARGUMENT

When a constitutional issue may be avoided by a state court interpretation of state law, the doctrine of judicial abstention should be applied.

Acting on the well established doctrine of abstention as applied to the facts of the instant case, the three judge court below required the appellants to seek an interpretation of Tennessee law by Tennessee Courts in order to avoid potential constitutional issues. The Court below stated in part:

> "In Harrison v. NAACP, 360 U.S. 167, the United States Supreme Court, in speaking on the doctrine of abstention of federal courts to permit action by the state courts, stated on page 176: 'This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a "Scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts," Matthews v. Rodgers, 284 U.S. 521, 525, as their contribution • • • in furthering the harmonious relation between state

and federal authority . . .' Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 501. In the service of this doctrine, which this Court has applied in many different contexts, no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. (Citing numerous cases). This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; and it spares the federal courts of unnecessary constitutional adjudication.

"Thus, in the light of the *Harrison* case, with its clear enunciation of the doctrine of abstention in cases of this type, we hold that the plaintiff's cause herein shall be stayed pending the prosecution of a proper declaratory judgment suit to be brought by the plaintiff in the courts of Tennessee for the purpose of obtaining an interpretation of the state statutes, regulations and city ordinances under consideration herein." Also see Appendix "A", Jurisdictional Statement of the appellant, and *Harrison v. NAACP*, 360 U.S. 167 (1959) (at pp. 176-177).

Thus, the three judges realized that the exercise of their jurisdiction would entail a possibility of premature and perhaps unnecessary decision of a serious constitutional question. This possibility is averted not by refusing to entertain jurisdiction, but by holding the case in abeyance while resort is had to state courts for an authoritative interpretation of state law.

This doctrine of abstention, while "a narrow and extraordinary exception to the duty of a District Court to adjudicate . .". *County of Allegheny v. Frank Mashuda Co.*, 360 *U.S.* 185, is nevertheless a valid and well established exception. Indeed, on June 8, 1959, the same day in which this Honorable Court decided the *Mashuda Co.* case, *supra*, this Honorable Court is affirming the U. S. District Court for the Eastern District of Louisiana, decided that a District Court could, *on its own motion*, apply the doctrine of abstention, if the situation warrants. *Louisiana Power & Light Company v. Thibodaux*, 360 *U.S.*, 25 (1959). Thus, abstention is not merely a defense to be either pleaded or waived, but a doctrine which the Court may apply on its own motion.

The Court below said that the statutes involved must be construed by the State Courts. Therefore, the issue before this Honorable Court is precise. It is necessary to take only two steps to resolve the problem presented.

The first step is a brief examination of the doctrine of abstention from its origin in *Railroad Commission of Texas v. Pullman Co.*, 312 *U.S.*, 496, through the implementation of that doctrine in numerous decisions by this Honorable Court. *City of Meridian v. Southern Bell Tel. & Tel.*, 358 *U.S.*, 639, (1959); *Shipman v. DuPre*, 339 *U.S.*, 321 (1950); *Spector Motor Service v. McLaughlin*, 323 *U.S.*, 101 (1944); *and City of Chicago v. Fieldcrest Dairies, Inc.*, 316 *U.S.*, 168 (1942).

Through this cited line of cases this Court has broadened the principle of abstention so that it is applied not only when a state court construction might avoid a constitutional question, but also when the exercise of jurisdiction would result in unnecessary friction by enjoining state officers

from executing state policy entailing matters of purely local concern. *Alabama Public Service Commission v. Southern Railroad Co.*, 341 *U.S.*, 341 (1951). Further developing abstention through the comity principle, this Court has upheld a postponement of jurisdiction to avoid interference with a state's administrative process, (*Burford v. Sun Oil Co.*, 319 *U.S.* 315, (1943) and to avoid colliding with the state's right to collect taxes, *Toomer v. Witsell*, 334 *U.S.* 385, 392 (1948).

The proper functioning and operation of our federal system is dependent upon a delicate balance between the state governments and the national government. The doctrine of judicial abstention, based on mutual respect and on comity, upholds that balance.

The wisdom behind the policy of abstention is questioned neither by appellant nor by appellee. Appellant only claims that the facts of this case do not require abstention. This leads us to step two.

Step two requires a close analysis of the instant fact situation to determine whether abstention was properly applied. If the rationale of the *Harrison* case, *supra*, is to be employed, then abstention is proper if the statutes involved do leave reasonable room for a state court construction "which might avoid in whole or in part the necessity for federal constitutional adjudication or at least materially change the nature of the problem. *Harrison v. N.A.A.C.P.*, *supra, at page* 177.

The first statutes involved in this case are Sections 53-2121 and 53-2120 of the Tennessee Code Annotated, relating to the Division of Hotel and Restaurant Inspection, Department of Conservation of State of Tennessee.

Appellant has stated in its brief (at Page 14) that the constitutionality of these sections is not questioned by anyone in this case. At page 15 of its brief, Appellant considers the above statutes and decides "restaurant segregation is clearly not mandatory". While Appellant asserts that its construction is correct, nevertheless, it is not its interpretation, but the rulings of the Supreme Court of Tennessee which bind Appellees. The history of judicial interpretation of legislative action demonstrates that the legislative intent is not deduced by a cursory glance.

Appellant, citing Regulation R-18 (L), notes that the regulation provides that "Restaurants catering to both white and negro patrons *should* . . ." be segregated. (Emphasis supplied). Then, Appellant points out that under Regulation R-1 "shall" is mandatory and "should" merely indicates *desirability*. (Emphasis suppplied) This leads Appellant to conclude that "restaurant segregation is clearly not mandatory. (Appellant's brief, p. 15.)

Appellant fails to add emphasis to the word "*shall*" in the *second* sentence of Regulation No. R-18 (L). This sentence says "Segregation will be considered proper where each race *shall* have separate entrances and separate facilities of every kind necessary to prevent patrons of the different races coming in contact with the other in entering, being served, or at any other time until they leave the premises. (Emphasis added.)" Is the second sentence mere surplusage added by the legislature? Appellee does not know how the Tennessee Supreme Court would interpret the regulations in question. As the distinguished three judge court below realized, the answer lies in requiring Appellant to go to the Tennessee Courts and find out.

The other statute involved in this case is Tennessee Code Annotated Section 62-710 which abrogated the common law rule giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement. This statute, like the others involved in this case, has never been authoritatively construed by the Tennessee Courts. Appellant again states that there are only two possible interpretations, and again concludes that no interpretation by the Tennessee Courts would avert the constitutional issue. (Appellant's brief, p. 17.) Perhaps Appellant is too hasty in stating that there are only two possible constructions to this statute. According to Appellant, the Tennessee Court will either say that this statute "furnishes Dobbs Houses the legal foundation for discrimination against Negroes", or that this statute does not apply to restaurants. Rarely is the task of interpreting legislation so simple. Again with deference to the Tennessee Courts and again only hazarding a possible, yet entirely reasonable, interpretation, the statute could be qualified by the equal protection clause of the Fourteenth Amendment. That is, the Court could hold that purely private operators of restaurants may discriminate against whomsoever they choose under the statute. However, operators in a class such as Dobbs House, insofar as the State is held to be a joint participant, may avail themselves of the statute as long as they do not discriminate against persons solely on the basis of color in violation of the Fourteenth Amendment. (*Burton v. Wilmington Parking Authority*, 365 *U.S.*, 715, 1916). This would certainly avert a constitutional de-

cision by this Honorable Court and prevent the needless friction involved in a Federal preemption of the State Court prerogative of construing its own statutes.

There is yet a further reason for abstention to be applied in this case. Assuming *arguendo* that this Honorable Court adopts the position urged by Appellant, an injunction will issue requiring Dobbs House not to discriminate against Negroes, and yet, since Appellant contends that the "statutes involved" are not involved, this Honorable Court could be requiring the violation of State law. In Tennessee, a law is presumed constitutional until it is found unconstitutional and officials are thereby bound.

Under the laws of Tennessee, a declaratory judgment statute[2] is available to the Appellant through which he may assert his grievance. The natural result of this procedure would permit the State of Tennessee an opportunity to determine the constitutionality of its own laws. This would be a procedure that is in keeping with the dignity that should be afforded any State of our Federal Union, and is, by the same token consistent with the decisions of the Supreme Court. It is not unreasonable to assume the State of Tennessee will fulfill its duty in construing these laws in the light of state and federal constitutional requirements. It is submitted that the Supreme Court of Tennessee has no inclination to shirk its duty toward this Supreme Court or its interpretation of the Constitution of the United States. In Roy v. Brittain, 201 Tenn., 140, it was held that under the supremacy clause of Article VI of the Constitution of the United States, the Tennessee Supreme Court was bound by the holding of United States Supreme

[2] Tenn. Code Ann., Vol V, Sec. 23-1101, et seq.

Court in the case of *Brown v. Board of Education of Topeka*, 347 *U.S.*, 483 (1954), and that the segregation of races in the field of public education under the separate but equal doctrine deprived persons so segregated of the equal protection of the laws guaranteed under this Amendment.

Finally, Appellant expresses concern over the alleged abdication of jurisdiction by the principle of abstention. Of course, it is elementary that, in abstaining, jurisdiction is not surrendered, but held in abeyance. As this Honorable Court stated in *Martin v. Creasy*, 360 *U.S.*, 219 (1959), at page 225, after abstaining from a construction of Pennsylvania law, which had not been interpreted by the Pennsylvania Court: "This is no reason to suppose that the Commonwealth of Pennsylvania will not accord full constitutional scope to the statutory phrase 'actual taking of property.' If, after all is said and done in the Pennsylvania Courts, any of the plaintiffs believe that the Commonwealth of Pennsylvania has deprived them of their property without due process of law, *this Court will be here.*" (Emphasis supplied)

Appellee prays that the Tennessee Courts be given the same chance as the Pennsylvania Courts. This Court may advise Appellant that should Appellant's grievance not be redressed by the Tennessee Courts, that this Honorable Court will still have jurisdiction.

CONCLUSION

It is respectfully submitted to this Honorable Court that the decision of the lower Court be affirmed and the appeal dismissed.

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CERTIFICATE OF SERVICE

I, Frank B. Gianotti, Jr., attorney herein and a member of the bar of the Supreme Court of the United States, do hereby certify that I have served upon counsel of record for the Appellant a copy of the foregoing Brief of Appellee, City of Memphis, by depositing true and correct copies thereof in the United States mail, first class postage prepaid, on _____, addressed as follows:

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